

State's Proposed Jury Instruction No. 1

**Issue in the Case**

The parties to this case are the Plaintiff, the State of Oklahoma, and the following Defendants: Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc. and Simmons Foods, Inc.

The State of Oklahoma claims that each Defendant has, by conduct occurring in Oklahoma on or after July 1, 1993, violated Oklahoma law (1) by causing pollution of waters of the State in the Oklahoma portion of the Illinois River Watershed, (2) by placing poultry waste in a location where it is likely to cause pollution of the waters of the State in the Oklahoma portion of the Illinois River Watershed, and / or (3) by causing poultry waste to be placed in a location where it is likely to cause pollution of the waters of the State in the Oklahoma portion of the Illinois River Watershed.

Each Defendant has denied this claim by the State.

This is the issue for you to determine in the case.

Authority: OUJI (Civil) No. 2.1

State's Proposed Jury Instruction No. 2

**Burden of Proof -- Greater Weight of the Evidence**

In a civil lawsuit, such as this one, the law provides which party is to prove certain things to you. This is called "Burden of Proof."

When I say that a party has the burden of proof on any proposition by the greater weight of the evidence, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true. The greater weight of the evidence does not mean the greater number of witnesses testifying to a fact, but means what seems to you more convincing and more probably true.

A party who seeks to recover on a claim, or a party who raises an affirmative defense has the burden to prove all the elements of the claim or defense. In deciding whether a party has met the burden of proof, you are to take into account all the evidence, whether offered by that party or any other party.

Authority: OUI (Civil) No. 3.1

*Henderson v. State*, 568 P.2d 297, 298 (Okla. 1977)

State's Proposed Jury Instruction No. 3

**Determining Believability of Witnesses**

You are the sole judges of the believability of each witness and the value to be given the testimony of each. You should take into consideration the witness's means of knowledge, strength of memory and opportunities for observation. Also consider the reasonableness and consistency or inconsistency of the testimony.

You should also consider the bias, prejudice, or interest, if any, the witness may have in the outcome of the trial, the conduct of the witness upon the witness stand, and all other facts and circumstances that affect the believability of the witness.

Authority: OUI (Civil) No. 3.13

State's Proposed Jury Instruction No. 4

**Expert Witness**

There has been introduced the testimony of witnesses who are represented to be skilled in certain areas. Such witnesses are known in law as expert witnesses. You may consider the testimony of these witnesses and give it such weight as you think it should have, but the value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying as an expert or otherwise. The testimony of an expert, like that of any other witness, is to be given such value as you think it is entitled to receive.

Authority: OUI (Civil) No. 3.21

State's Proposed Jury Instruction No. 5

**Circumstantial Evidence**

A party is not required to prove its claims or defenses by direct evidence. A party may prove its claims or defenses by circumstantial evidence. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.

Authority: *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)

*Dillon v. Fibreboard Corp.*, 919 F.2d 1488, 1490 (10th Cir. 1990)

*California Oil Co. v. Davenport*, 435 P.2d 560, 563 (Okla. 1967)

*Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 950-51 (Okla. 1957)

*Peppers Refining Co. v. Spivey*, 285 P.2d 228, 231-32 (Okla. 1955)

*Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d 886, 892 (10th Cir. 2000)

*United States v. Valentine*, 856 F. Supp. 621, 627 (D. Wyo. 1994)

State's Proposed Instruction No. 6

**Act of Corporate Officer or Employee as Act of Corporation**

Corporations can act only through their officers, employees and agents. Any act or omission of an officer or employee or agent while acting within the scope of his / her employment is the act or omission of the corporation. Consequently, a corporate party may be held liable for any violations of law that result from the acts or omissions of its officers, employees or agents.

Authority: OUJI (Civil) No. 7.7

## State's Proposed Jury Instruction No. 7

**Liability for Acts of Employee / Agent**

You may have heard evidence that the poultry growers who raise birds for the Defendants own their own farms and sign contracts with the Defendants to raise birds owned and delivered by the Defendants. These poultry growers may have been referred to in this case as "independent contractors." The law, however, looks beyond how the various parties might refer to, label or characterize the relationship when determining the actual nature of the relationship. Determining the actual nature of the relationship is important, because if you find that a poultry grower was the employee of a Defendant and was acting within the scope of his / her employment at the time of the conduct complained of in this case, then any act or omission of that poultry grower at that time was, as a matter of law, the act or omission of the Defendant employing that poultry grower. Similarly, if you find that a poultry grower was the agent of a Defendant and was acting within the scope of his / her agency at the time of the conduct complained of in this case, then any act or omission of that poultry grower at that time was, as a matter of law, the act or omission of that Defendant.

Authority: OUI (Civil) No. 7.3

State's Proposed Jury Instruction No. 8

**Employer and Employee -- Defined**

An employee is a person who, by agreement with another called the employer, acts for the employer and is subject to its control. The agreement may be oral or written or implied from the conduct of the parties.

Authority: OUI (Civil) No. 6.4



State's Proposed Jury Instruction No. 9

**Existence of an Employer / Employee Relationship**

The State contends that there was an employer / employee relationship between the Defendants and their respective poultry growers. Specifically, the State contends that the Defendants were the employers of their respective poultry growers. The Defendants have disputed this contention. It is therefore for you, the jury, to determine whether an employer / employee relationship existed between the Defendants and their respective poultry growers.

The determination of whether there was an employer / employee relationship depends on the facts of the particular case. The following factors are considered to determine whether an employer / employee relationship existed: (a) the nature of the contract between the parties, whether written or oral; (b) the degree of control which, by the agreement, the employer may exercise on the details of the work or the independence enjoyed by the contractor or agent; (c) whether or not the one employed is engaged in a distinct occupation or business and whether he carries on such occupation or business for others; (d) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (e) the skill required in the particular occupation; (f) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (g) the length of time for which the person is employed; (h) the method of payment, whether by the time or by the job; (i) whether or not the work is a part of the regular business of the employer; (j) whether or not the parties believe they are creating the relationship of master and servant; and (k) the right of either party to terminate the relationship without liability.

A decisive factor is the control exerted by the employer over the work.

Authority:     *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1294 (N.D. Okla. 2003), *vacated in connection with settlement*

*Page v. Hardy*, 334 P.2d 782, 784-85 (Okla. 1959)

*Duncan v. Powers Imports*, 884 P.2d 854, 856 n. 1 (Okla. 1994)

*Coleman v. J.C. Penney Co.*, 848 P.2d 1158, 1160 (Okla. 1993)

*Bouziden v. Alfalfa Electric. Coop., Inc.*, 16 P.3d 450, 459 (Okla. 2000)

State's Proposed Jury Instruction No. 10

**Scope of Employment**

An employee is acting within the scope of his / her employment if he / she (1) is engaged in the work which has been assigned to his / her by his / her employer, or (2) is doing that which is proper, usual and necessary to accomplish the work assigned to his / her by his / her employer, or (3) is doing that which is customary within the particular trade or business in which the employee is engaged.

Authority: OUJI (Civil) No. 6.7

State's Proposed Jury Instruction No. 11

**Agency -- Defined**

The relationship of agency is created from the conduct and / or agreement of the parties showing that one is willing for the other to act for him / her subject to his / her control and that the other consents to so act. An agency relationship may arise under such circumstances even when the parties may not have intended to create one. The person who acts for another is called the agent and the other is called the principal.

Authority: OUII (Civil) No. 6.2

## State's Proposed Jury Instruction No. 12

**Existence of a Principal / Agent Relationship**

The State also contends that there was a principal / agent relationship between the Defendants and their respective poultry growers. Specifically, the State contends that the poultry growers were the agents of the respective Defendants. The Defendants have disputed this contention. It is therefore for you the jury to determine whether a principal / agent relationship existed between the Defendants and their respective poultry growers.

The determination of whether there was a principal / agent relationship depends on the facts of the particular case. A principal / agent relationship is determined by the parties' status, which is found from surrounding facts and is not dictated by the contract. In the event of a discrepancy between facts and contract language, facts control over contrary contractual language. The central factor in determining whether an agency relationship exists is the principal's right to, as well as its exercise of, control over the agent. The essence of a principal / agent relationship is the principal's -- that is, the Defendants' -- power to give directions and the agent's -- that is, the respective poultry growers' -- duty to obey them.

Authority:     *Wathor v. Mutual Assurance Administrators, Inc.*, 87 P.3d 559, 566-67 (Okla. 2004)

*Enterprise Management Consultants, Inc. v. State of Oklahoma ex rel. the Oklahoma Tax Commission*, 768 P.2d 359, 362 n. 12 (Okla. 1988)

## State's Proposed Jury Instruction No. 13

**Scope of Authority**

An agent is acting within the scope of his / her authority if (1) he / she is engaged in the transaction of business that has been assigned to him / her by his / her principal, or (2) if he / she is doing anything that may reasonably be said to have been contemplated as a part of his / her agency. It is not necessary that an act or failure to act must have been expressly authorized by the principal.

In addition to the express authority conferred on him / her by his / her principal, an agent has the authority to do such acts as are incidental to, or reasonably necessary to accomplish, the intended result. An agent also has the implied authority to do such acts as are usual and customary in the business, and of which the principal has knowledge or should have had knowledge.

When one person acts or purports to act as an agent for another, but does so without authority, and the person for whom he / she acted thereafter confirms such action, by words or conduct, with knowledge of all the material facts, such words or conduct are a ratification of the act, and are the same as if it had been authorized originally. If the principal ratifies any part of the act, it ratifies all of it.

Authority: OUJI (Civil) No. 6.8

OUJI (Civil) No. 6.9

OUJI (Civil) No. 6.10

OUJI (Civil) No. 6.13

## State's Proposed Jury Instruction No. 14

**Liability for Acts of Independent Contractor**

One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve the creation of a public nuisance, is subject to liability for harm resulting to others from such nuisance. It is not necessary that the nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, a nuisance is likely to result.

Thus, even if you determine that a Defendant did not have an employer / employer relationship or a principal / agent relationship with its poultry growers, that Defendant is nonetheless still liable under the State's claim for violations of 27A Okla. Stat. § 2-6-105(A) if you determine that that Defendant contracted with a poultry grower to do work which that Defendant knew or had reason to know to be likely to involve a violation of 27A Okla. Stat. § 2-6-105(A).

Whether one or more violations of 27A Okla. Stat. § 2-6-105(A) has in fact occurred is for you to determine, based upon the instructions I will give to you.

Authority:     *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1294-97 (N.D. Okla. 2003), *vacated in connection with settlement*

Restatement (Second) Torts § 427B & comment b

*Tankersley v. Webster*, 243 P. 745, 747 (Okla. 1925)

*Weinman v. De Palma*, 232 U.S. 571, 575 (1914)

*McQuilken v. A&R Development Corp.*, 576 F.Supp. 1023, 1033 (E.D. Pa. 1983)

*Bleeda v. Hickman-Williams & Co.*, 205 N.W.2d 85 (Mich. App. 1972)

*Peairs v. Florida Publishing Co.*, 132 So.2d 561 (Fla. 1st DCA 1961)

*Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278 (Iowa 1963)



State's Proposed Jury Instruction No. 15

**Violation of 27A Okla. Stat. § 2-6-105(A) Defined**

The State claims that each Defendant has violated 27A Okla. Stat. § 2-6-105(A). There are three different and independent ways a person can be liable under 27A Okla. Stat. § 2-6-105(A).

First, it is a violation of 27A Okla. Stat. § 2-6-105(A) for any person to cause pollution of any waters of the State of Oklahoma.

Second, it is a violation of 27A Okla. Stat. § 2-6-105(A) for any person to place any wastes in a location where they are likely to cause pollution of any waters of the State of Oklahoma.

Third, it is a violation of 27A Okla. Stat. § 2-6-105(A) for any person to cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the State of Oklahoma.

A person, by the same conduct, can be in violation of more than one of these three bases at the same time. You, the jury, must determine whether each Defendant, either itself or through the conduct of others who it is by law responsible for, has violated one or more of these provisions of 27A Okla. Stat. § 2-6-105(A).

27A Okla. Stat. § 2-6-105(A) applies only to conduct occurring within the borders of the State of Oklahoma. Therefore, only conduct by a Defendant, or by one who a Defendant is by law responsible for, occurring within the borders of the State of Oklahoma may constitute a violation of 27A Okla. Stat. § 2-6-105(A). Conduct occurring within the borders of the State of Arkansas may not constitute a violation of 27A Okla. Stat. § 2-6-105(A). However, conduct

occurring within the State of Arkansas may be relevant to your determination of whether conduct occurring within the State of Oklahoma is violating 27A Okla. Stat. § 2-6-105(A).

Additionally, 27A Okla. Stat. § 2-6-105(A) pertains only to conduct occurring on or after July 1, 1993.

Each day or part of a day upon which a violation of 27A Okla. Stat. § 2-6-105(A) occurs constitutes a separate violation of 27A Okla. Stat. § 2-6-105(A). Therefore, for each violation of 27A Okla. Stat. § 2-6-105(A) by a Defendant that you determine has occurred, you the jury must also determine (1) when the violation occurred, (2) whether the violation was or is continuing in nature, and (3) if the violation was or is continuing in nature, when, or if, the violation stopped.

Authority: 27A Okla. Stat. § 2-6-105(A)

27A Okla. Stat. § 2-3-504

State's Proposed Jury Instruction No. 16

**Definition of "Person" for Purposes of 27A Okla. Stat. § 2-6-105(A)**

For purposes of 27A Okla. Stat. § 2-6-105(A), the term "person" means an individual, association, partnership, firm, company, public trust, corporation, joint-stock company, trust, estate, municipality, state or federal agency, other governmental entity, any other legal entity or an agent, employee, representative, assignee or successor thereof.

Authority: 27A Okla. Stat. § 2-1-102(11)

State's Proposed Jury Instruction No. 17

**Definition of "Pollution" for Purposes of 27A Okla. Stat. § 2-6-105(A)**

For purposes of 27A Okla. Stat. § 2-6-105(A), the term "pollution" has two separate, independent definitions.

First, "pollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment.

Second, and alternatively, "pollution" means the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance *or* which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property.

Because one of the two definitions of "pollution" for purposes of 27A Okla. Stat. § 2-6-105(A) uses the term "nuisance," I will define that term for you. The following definition and explanation of the term "nuisance" applies only to the term "nuisance." The term "nuisance" means (1) an unreasonable interference with the State's or the public's beneficial use or enjoyment of the waters of the State located in the Oklahoma portion of the Illinois River Watershed, or (2) an unreasonable and substantial endangerment to the public's health or safety in the waters of the State located in the Oklahoma portion of the Illinois River Watershed. It is not necessary that the State establish that the Defendants' actions were unreasonable, but rather, that the resulting burden on the State or the public was unreasonable.

A person is subject to liability for a nuisance caused by an activity not only when that person carries on the activity, but also when that person participates to a substantial extent in carrying it on.

There is no prescriptive right to maintain a public nuisance. No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right or the pollution of waters of the State.

Possession of a license or a permit issued by a regulatory body is not a defense for that person to avoid liability under nuisance law for interfering with the rights of others. A license or permit to do a certain act cannot protect the licensee or permittee who abuses the privilege by erecting or maintaining a nuisance.

The State claims that Defendants' acts in causing a nuisance are intentional. In this regard it is not necessary for the State to prove that Defendants intended to cause the specific harm that resulted from their conduct, only that the conduct causing the harm is intentional. Whether or not the first invasion is intentional, when the conduct is continued after the party knows that the invasion is resulting or is substantially certain to result from its conduct, the invasion is intentional.

Authority: 27A Okla. Stat. § 2-1-102(12)

50 Okla. Stat. § 1

50 Okla. Stat. § 7

Restatement (Second) Torts § 821B

Restatement (Second) Torts § 834

*N.C. Corff Partnership v. Oxy U.S.A., Inc.*, 929 P.2d 288, 294 (Okla. Civ. App. 1996)

*Fischer v. Atlantic Richfield Co.*, 774 F. Supp. 616, 620 (W.D. Okla. 1989)

*Union Oil of California v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994)

*Briscoe v. Harper*, 702 P.2d 33, 36 (Okla. 1985)

*City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1301 (N.D. Okla. 2003), *vacated in connection with settlement*

Restatement (Second) Torts § 825

OUJI (Civil) No. 3.4

State's Proposed Jury Instruction No. 18

**Definition of "Waters of the State" for Purposes of 27A Okla. Stat. § 2-6-105(A)**

For purposes of 27A Okla. Stat. § 2-6-105(A), the term "waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof.

Authority: 27A Okla. Stat. § 2-1-102(15)

State's Proposed Jury Instruction No. 19

**Definition of "Cause" for Purposes of 27A Okla. Stat. § 2-6-105(A)**

For purposes of 27A Okla. Stat. § 2-6-105(A), the term "cause" means "direct cause."

"Direct cause" means a cause which, in a natural and continuous sequence, produces a harm and without which the harm would not have happened. For conduct to be a "direct cause," the harm must have been a reasonably foreseeable result of the conduct.

There may be more than one direct cause of a harm. When a harm is the result of the combined conduct of two or more persons, the conduct of each person is a direct cause of the harm regardless of the extent to which each contributes to the harm. Put another way, where the separate and independent acts or wrongdoing of several persons combine or contribute to produce directly an indivisible harm -- here, the pollution of the waters of the State -- each person is responsible for the entire result, even though its act or wrongdoing alone might not have caused it. A harm is indivisible when it is incapable of apportionment. The harm to the waters of the State in the Oklahoma portion of the Illinois River Watershed is indivisible.

It is not necessary that the wrongdoers be acting together or in concert in order to be liable for the entire harm.

In this case you may have heard evidence of other potential releases of phosphorus and / or bacteria in the environment of the Oklahoma portion of the Illinois River Watershed, and that the Defendants' conduct did not cause or contribute to those releases. If you find that releases other than those of any Defendant were the sole cause of any pollution of the waters of the State in the Oklahoma portion of the Illinois River Watershed, then your verdict should be for the Defendants. But if you find that one or more Defendant's conduct contributed to or comingled with other releases of phosphorus and / or bacteria resulting in pollution of the waters of the



State in the Oklahoma portion of the Illinois River Watershed, then your verdict should be for the State and against each such Defendant.

If you find that one or more of the Defendant's conduct caused or contributed to pollution, you are not to consider whether or to what extent others have contributed to any pollution of the waters of the State in the Oklahoma portion of the Illinois River Watershed. Nor are you to consider as among the Defendants you have found against what percentage or portion of the pollution each such Defendants may be responsible for.

Authority: OUJI (Civil) 9.6

OUJI (Civil) No. 9.7

*Philips Petroleum v. Vandergriff*, 122 P.2d 1020, 1023 (Okla. 1942)

*Johnson v. Ford Motor Co.*, 45 P.3d 86, 92 (Okla. 2002)

*Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 952 (Okla. 1957)

*Union Texas Petroleum Corp. v. Jackson*, 909 P.2d 131, 150 (Okla. Civ. App. 1995)

*City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1297-1302 (N.D. Okla. 2003), *vacated in connection with settlement*

State's Proposed Jury Instruction No. 20

**Animal Waste Management Plans**

You may have heard evidence concerning animal waste management plans (sometimes referred to as nutrient management plans). An animal waste management plan is not a permit or authorization to land apply poultry waste. Compliance with or attempted compliance with an animal waste management plan is not a defense to a claim brought under 27A Okla. Stat. § 2-6-105(A).

Authority: 2 Okla. Stat. § 10-9.7

State's Proposed Jury Instruction No. 21

**Oklahoma Registered Poultry Feeding Operations Act**

You may have heard evidence concerning the Oklahoma Registered Poultry Feeding Operations Act (sometimes referred to as the Poultry Act). The Oklahoma Registered Poultry Feeding Operations Act requires that poultry waste handling, treatment, management and removal (1) not create an environmental or a public health hazard, and (2) not result in the contamination of waters of the State. Runoff of poultry waste from a land application site is prohibited.

Authority: 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b)

2 Okla. Stat. § 10-9.7 (C)(6)(c)